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NOT THE CITY OF GOD: THE MULTIPLICITY OF WRONGS AND RULES

*Geoffrey C. Hazard, Jr.**

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The standard modern method of thinking is analytic, isolating a specific problem for attention, but for people in the real world, including clients of lawyers, their practical and legal problems usually come in complex clusters. A different approach, complementing the analytic technique, would look at these problems in a very old-fashioned “holistic” way, what can be called a medieval approach.¹

I. INTRODUCTION

The message I seek to transmit is a cautionary observation, perhaps a complaint, about prevailing method of analysis of ethical issues, including the subcategory of ethics that consists of law. The prevailing

* The Miller-Becker Institute for Professional Responsibility’s First Distinguished Lecturer in Professional Responsibility.

1. VAL DUSEK, *THE HOLISTIC INSPIRATIONS OF PHYSICS* 20 (Rutgers University Press 1999).

method is patterned on the experimental technique in scientific analysis.² I want to suggest that the method is inadequate for dealing satisfactorily with real world ethical and legal problems, and indeed can distort analysis and often lead to unsound conclusions.

II. "ETHICAL ISSUES" BROADLY DEFINED

"Ethical issues" include all the morally charged choices we make in everyday life. These involve, for example, how to allocate our time, energy and attention between family and work; how to deal with blundering or obnoxious colleagues in the workplace; how to handle the competing claims on our limited financial resources, and so on. A subcategory consists of the issues that take "legal" form. These include the subjects of a law school curriculum and the practice of law, for example, property law, tort law, employment law. The legal concepts involved are expressed in rules defining the legal rights and obligations, for example:

- under the law of mortgages, homeowners' legal relationships with mortgage companies;³
- under the law of consumer protection, consumers' relationships with lenders and sellers of products;⁴
- under employment law, the rules governing employees' rights in relation to employers.⁵

And so on.

The relationships addressed by these and other rules and standards of behavior are not simple, but on the contrary are highly complex. They all involve the convergence of many economic, political and social forces. For example, the appropriate level of legal protection of homeowners from mortgage companies involves, among other issues, assumptions about the economic structure of the housing market and about the sources of funds in the financial markets; assumptions about the ability of average home buyers to understand a mortgage transaction, and, at a different level, their ability to appreciate the burden involved in any long-term financial commitment.⁶ Similar assumptions are involved

2. See Andrew C. Wicks & R. Edward Freeman, *Organization Studies and the New Pragmatism: Positivism, Anti-Positivism, and the Search for Ethics*, ORGANIZATIONAL SCIENCE, Mar.-Apr. 1998, at 123, 125.

3. See 54A AM. JUR. 2D *Mortgages* § 1 (2008).

4. See 63 AM. JUR. 2D *Products Liability* § 1 (2008).

5. See 27 AM. JUR. 2D *Employment Relationship* § 1 (2008).

6. See REN S. ESSENE & WILLIAM APGAR, UNDERSTANDING MORTGAGE MARKET BEHAVIOR: CREATING GOOD MORTGAGE OPTIONS FOR ALL AMERICANS 1, 2-7 (2007),

in an understanding of consumer law and legislation and employment law, and indeed all legal subject-matter.

All these legal problems also are moral problems. That is, above and beyond what law may require or prohibit are questions of proper voluntary conduct on the part of the participants in the relationships. They can be referred to in a more general descriptive term: They are normative problems—problems about what ought to be done.⁷

III. SCIENTIFIC METHOD

As analysts and professional practitioners, we aim to understand these situations in rational terms. The modern model of rational analysis is patterned on scientific inquiry, because science is the contemporary model of rationality. The scientific model seeks to identify specific variables, to isolate one variable from the cluster of other variables with which it is embedded, and then to evaluate the effect or significance of that variable.⁸ For example, in the home mortgage problem, a scientific approach would identify the education level of the average homeowner as a likely important variable, as no doubt it is. The scientific method would isolate that variable from its context, try to measure its dimensions, and then evaluate its causal significance in quantitative terms.

The results of such analysis are modern social science—sociological analysis, political analysis, and, more fashionable today, economic analysis. The pursuit of such results manifests itself in today's legal academies as the various categories of "law and..."

I applaud these inquiries, support them and their practitioners, and have even committed some myself, mostly in the field of historical analysis of legal rules.⁹ I encourage their continuation and development. However, I invite a parallel and concurrent method of thinking about the problems that law and morality must address. We should not think of these as alternative modes of thought but rather as ones employed concurrently to complement each other. Accordingly, we should be cautious about the validity of the scientific method as exclusive and sufficient in formulation of social and legal policy. This emphatically is

http://www.jchs.harvard.edu/publications/finance/mm07-1_mortgage_market_behavior.pdf.

7. JANET BUTTOLPH JOHNSON, H.T. REYNOLDS, & JASON D. MYCOFF, *POLITICAL SCIENCE RESEARCH METHODS* 31 (CQ Press 2008) (6th ed. 2008).

8. *See id.* at 65.

9. *See* Geoffrey Hazard et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

not a call for abolishing social statistics; it is only a call for caution in their use.

IV. A MEDIEVAL VIEWPOINT

An approach different from the scientific model can be called a holistic approach or a Medieval viewpoint.¹⁰ This viewpoint prevailed in the Western community prior to the scientific revolution that is identified with the Renaissance, beginning in about the fourteenth century. The holistic approach had been inherited from the ancients, going back to the Greek philosophers and the Biblical fathers.¹¹

This viewpoint sought to embrace all elements of reality rather than isolate one element from another.¹² It interpreted reality inclusively, running from the heavens above to the world around us, to man's inner conscience here below, and to mankind's conversance with God.¹³ In the Greek tradition, particularly with Aristotle, it made an effort to identify the elements of what was understood as material reality, in terms of basic constituents.¹⁴ In the ancient understanding of physics these were believed to be water, the air, the earth and fire.¹⁵ The inaccuracy of this understanding should not obscure the fact that the viewpoint was comprehensive.

In this viewpoint, seeking to factor out specific variables—to push them out of consideration—was considered unsound, indeed foolish. Doing so would have been a distortion and unrealistic, as indeed in a profound sense it was. That ancient viewpoint prevailed in Judaism and early Christianity, manifested in their acceptance of what is now called neoplatonism.

A leading exponent of the Medieval viewpoint was St. Augustine in the fourth century of the Christian era, as will be presently explained. That viewpoint has a counterpart or mirror image in the Bible, as also will be presently explained. The Bible begins with a story of creation, in which the entire physical existence observable to mankind was believed to have been constituted. According to the book of Genesis, everything was all there in six days, virtually in an instant.¹⁶ Creationism, as it is

10. VAL DUSEK, *supra* note 1, at 20.

11. *Id.* at 19-20.

12. *Id.* at 20.

13. *Id.* at 22.

14. STEPHEN PEARL ANDREWS, *THE BASIC OUTLINE OF UNIVERSOLOGY* 54-55 (D. Thomas 1872).

15. *Id.*

16. *Genesis* 1:1-2:3 (King James).

now called, has become controversial as we all know. But its interpretation of the world as an integral whole is worthy of consideration and appreciation in moral terms, even if it is no longer generally acceptable in scientific terms.

As a related proposition, I suggest that the Bible, and what I have called the Medieval approach to reality, is underappreciated as a source of moral and legal interpretation and guidance.

V. ST. AUGUSTINE

St. Augustine was the most prolific and among the most profound sources of Christian religious and moral thought in the pre-scientific era. His work of specific relevance here is *The City of God*, the work from which the title of this address is taken. St. Augustine's message in *The City of God* was that the world we live is emphatically not the City of God, which Augustine understood was available only after worldly death.¹⁷ In the meantime, humankind had to endure and survive in this world, what he called the City of Man.¹⁸

The City of Man for Augustine was in the fourth century CE, toward the end of the Roman Empire. It was not a happy place. The governance in Rome had become uncivilized, corrupt and incompetent. Vandals were swarming into the Roman cities, including Augustine's own city. Trade was diminishing, prices rising. There were no car bombings, of course, because gasoline had not been invented. But otherwise the world he described bears remarkable similarity to our present era, which makes his exposition especially relevant.

St. Augustine described the world as follows:

[T]he whole human race has been condemned in its first origin, this life itself, if life it is to be called, bears witness by the host of cruel ills with which it is filled...gnawing cares, disquiet, griefs, fears, wild joys, quarrels, law-suits, wars, treasons, angers, hatreds, deceit, flattery, fraud, theft, robbery, perfidy, pride, ambition, envy, murders, parricides, cruelty, ferocity, wickedness, luxury, insolence, impudence, shamelessness, fornications, adulteries, incests ... sacrileges, heresies, blasphemies, perjuries, oppression of the innocent, calumnies, plots, falsehoods, false witnessings, unrighteous judgments, violent deeds, plunderings...superfluity of foolish desires....¹⁹

17. 2 AURELIUS AUGUSTINE, *The City of God*, in THE WORKS OF AURELIUS AUGUSTINE, BISHOP OF HIPPO 517, 517-18 (Marcus Dods ed., Kessinger Publishing 2007).

18. *Id.*

19. *Id.*

There are several important elements to be recognized in this recount. First, the vexing problems of life are multiple, not single. Moreover, they do not arise in orderly sequence. For example, the “wars” to which Augustine refers happen at the same time as other “cruel ills,” the “treasons” and “angers” and “theft,” and so on. Moreover, each of the “cruel ills” in any individual’s experience is unique unto itself—a one-time happening. But history and personal experience have a one-way direction—they do not repeat themselves. They also all involve the convergence of multiple causal factors—cultural, sociological, economic, political, psychological.

For these reasons the “cruel ills” of life cannot be experimentally replicated. Among “cruel ills” that are large in number and similar to each other, they can at best can be only partially dissected by statistical technique.

These social ills present difficult issues of appropriate response in terms of moral values such as truthfulness, courage, a sense of justice, mercy, fulfillment of fiduciary responsibilities--the virtues to which both the Greeks and the Bible referred. They also present difficult issues of use of force and the coercive power of government, with which we lawyers are especially familiar. They of course have direct equivalents in our contemporary experience.

As a consequence of these characteristics of the real world of the City of Man, as Augustine called it, our clients do not confront one moral or legal problem at a time. By the same token, we must share that viewpoint. At every given point in time, for us individually and for our clients, and for our community, every problem is embedded in or connected to other problems. In the meantime, there is always another problem foreseeable in the near future or down the road. By the same token, the resources to deal with one of these problems—resources such as the necessary attention, human energy, the financial and political requirements—are generally in competition with each other.

VI. NO “DO OVER”

Real world ethical and legal problems thus are unique single instances, and hence not susceptible to repetition, and they also involve multiple converging causal forces. Accordingly, they are shielded from very deep penetration by the scientific method. The scientific method requires isolation of variables, but variables in real life are not isolated or susceptible of isolation. Stated in different terms, real life has an

ineradicable historical dimension. Putting the point in street talk, in the ordinary experiences of life there is no “do over.”

If we cannot with much accuracy disentangle the converging forces that generate these problems—if there is no possibility of “do over” in resolving or even diagnosing them—is there a feasible alternative to the analytic method in thinking about them? Perhaps there is if we consider ethical problems in terms of what I have identified as the Medieval viewpoint—looking at these problems in their aggregate and interactive dimensions.

The Medieval viewpoint involved not only an inclusive apprehension of the cruel ills of life cataloged by Augustine, but also a complementary corpus of rules and standards of conduct responsive to, and indeed inspired by, those cruel ills. There were in Medieval times and before that, and there have been ever since, rules against murder and against bearing false witness, for example. These are only two of the rules stated in the Ten Commandments of the Judeo-Christian tradition. There were many other rules in that ancient Covenant Code, as the Jews called it. Essentially the same rules are found in the Justinian Code of the Roman law tradition.

The Medieval viewpoint understood the normative network to be the Law as prescribed by God and recorded in the Bible. The world and its “cruel ills” was understood as being shrouded by a canopy of Divine Law.

In this secular era, we may have difficulty conceiving the world in this way. However, we can bring to mind that we in fact have a canopy of laws. We can visualize it as having a secular source as well—for example, the regime of our American Constitution. In that regime some of the appropriate rules or standards are legal ones, backed by the force of government and applied through our various bureaucracies. These legal standards are supported by and augmented by moral standards evident in a community’s life and customs. Particularly in an open society, the ethical norms are backed by the force of moral, communal and religious judgments. And these moral judgments govern most transactions in everyday life, even if they function imperfectly, especially as between strangers.

VII. THE WISDOM OF THE ANCIENTS

The sources of this normative intuition in the Western tradition include the Greek philosophers, notably Socrates, Plato and Aristotle, and the Bible. These ancients addressed normative problems of the kind

that we must still ponder: what is “justice,” what is proper conduct, what is the nature of “the good.” Both the Greeks and the Biblical authors took a holistic view of the problem of proper conduct, not the modern scientific one.

There were to be sure important differences among the ancients in how they understood moral problems. Speaking generally, the Greeks were primarily concerned with analysis. Socrates as reported by Plato challenged his audience to define and understand the concept of “justice.”²⁰ The Socratic dialogues led to the conclusion that defining justice was very difficult. Plato in *The Republic* proposed construction of a normative network through an authoritarian regime, in which the cruel evils of life would be constrained by rigorous social controls.²¹ That idea remains attractive as ideal, and is the progenitor of modern fascist and communist regimes. But it has proved repulsive, corrupt and ineffective when put into practice.

In his *Nicomachean Ethics* Aristotle was much more tentative about the normative network.²² He famously remarked that the subject of ethical standards does not yield of much precision, but only “as much clearness as the subject-matter admits of...”²³ He went on to say:

“It is difficult sometimes to determine what should be chosen at what cost, and what should be endured in return for what gain.”²⁴

Aristotle’s analysis left it at that.

Conventional modern ethical discourse generally leaves the subject in similar indeterminacy, a citadel of ethical doubt. The English philosopher, the late Bernard Williams, has observed:

The result...makes a virtue out of uncertainty itself and, in place of conviction, enjoys the satisfactions—the equally intellectualist satisfactions—of a refined indecision.²⁵

20. Charles H. Kahn, *Did Plato Write Socratic Dialogues?*, 31 THE CLASSICAL QUARTERLY No. 2, 305, 311 n.16 (1981).

21. Plato, *Republic*, in CLASSICS OF PHILOSOPHY 74, 81 (Louis P. Pojman ed., Oxford University Press 1998).

22. ARISTOTLE, THE NICOMACHEAN ETHICS 49 (David Ross trans., Oxford University Press 1980) (1925).

23. *Id.* at 2-3.

24. *Id.* at 49.

25. BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 169 (Harvard University Press 1985).

VIII. THE BIBLICAL MODEL

The approach in the Bible is in challenging contrast. The usual understanding of the Bible, and the usually appropriate one, considers its text as a religious document. As such it is the word of God, recorded by his Jewish and later his Christian followers. But the Bible can also be understood as a secular text in morals, in ethics and in law.

The particularly relevant text in this context is in the first five books of the Bible, the Pentateuch as it is called in the Christian tradition, the Torah in Judaism, the Covenant Code in both traditions. Beyond the story of Creation and of the early history of the Jews and then their Christian successors, this text consists primarily of moral and legal prescriptions that were taken as Law handed forth by God.

The Pentateuch or Torah is an essentially comprehensive network of rules governing all aspects of life as it was then experienced. In modern Christian understanding of the Bible, the Law is often understood as only the Ten Commandments on the tablets given to Moses. In fact, however, the rules of conduct set forth in the Bible have been counted by scholars as 613 distinct standards.²⁶ They include not only the familiar prohibitions on murder, adultery, false swearing, and coveting a neighbor's property but also a panoply of other prescriptions: Rules concerning relationships within the family, with neighbors, with members of alien communities, in commercial dealings, etc.²⁷ Jews are, of course, familiar with the restrictions on kinds of food, and most of us can bring to mind that there is a rule requiring rest after each six-day week of work.

Among many examples of these peremptory rules are the following:

-If a man shall...put in his beast...in another man's field...[then from] the best of his own field...shall he make restitution.²⁸

-If thou lend money to any of my people that is poor by thee, thou shalt not be to him as an usurer...²⁹

-[T]hou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.³⁰

26. WAYNE DOSICK, *LIVING JUDAISM: THE COMPLETE GUIDE TO JEWISH BELIEF, TRADITION, AND PRACTICE* 31 (HarperCollins 1998).

27. *Id.* at 31-35.

28. *Exodus* 22:5 (King James).

29. *Exodus* 22:25 (King James).

30. *Exodus* 23:9 (King James).

-Ye shall do no unrighteousness...in weight, or in measure. Just balances, just weights...shall ye have.³¹

The ancient Law of the Bible can be taken as an ethical template for modern law and legislation. The Bible's rules covering "servants," for example, have counterparts in modern labor law; those concerning use of property correspond to the modern law of trespass. The subject matter of the Bible's code of Laws is essentially a counterpart of Augustine's litany of evils. That is, St. Augustine identifies the kinds of evil, while the Bible deals with preventive and ameliorative standards of conduct that address those evils.

The Biblical Law is believed by many to be the word of God and authoritative as such. That belief should not be disturbed or disparaged. But it is not disparaging of that belief to consider the Biblical Law in secular terms. Considered in secular terms it is a model normative system—complex and comprehensive. Taken together, the normative model in the Bible, which codifies proper standards of conduct, and the existential reality described by Augustine constitute what I have called the Medieval viewpoint. In that viewpoint, everything is connected to everything else. It could also be called a holistic or integrative approach to ethical standards.

IX. IN CONCLUSION: AN INTEGRATIVE APPROACH TO ETHICAL STANDARDS

To repeat, this is not a suggestion that we reject the modern scientific approach to understanding human conduct. We should continue to pursue the social sciences of anthropology, psychology and economics, for example. Through these and other social sciences we have learned much about problems of perception, of interpretation, of the significance of language and "labeling," of the complex social interactions diagnosed in modern economics and political science.

It is, however, a suggestion about understanding moral and legal problems: That these problems also be understood in terms of "context" and "situation," terms that imply the holistic approach to which I have referred.

Accordingly, we may seek to dissect elements of a legally or morally significant event, pursuing analytic technique as far as possible. At the same time, however, we should keep in mind that real world events arise in a context or situation and that they are connected through

31. *Leviticus* 19:35-36 (King James).

complex interaction and connected also through a comprehensive normative network. In our Western heritage that network includes the philosophical tradition of the Greeks and the moral and legal tradition established in the Bible.

A further thought: When we confront serious moral and legal issues, error can result in too sharply distinguishing between what “is,” as described by St. Augustine for example, and what “ought to be,” as prescribed in our Western moral tradition. The moral tradition of what “ought to be,” our heritage in the Biblical Law, is part of what “is.”

